Supreme Court of the United States

OCTOBER TERM, 1942

No.....

MILDRED MAYO DEAL, ...*Petitioner,*

v.

VENDA C. ABRAMSON, ...*Respondent.*

Brief in support of petition for writ of certiorari.

The opinion of the Circuit Court of Appeals for the Eighth Circuit appears in 132 Fed. (2d) 252.

The date of the decree to be reviewed is December 28, 1942.

The jurisdiction of this court is invoked under the act of Congress of February 13, 1925, Ch. 229, 43 Statutes 936, 237 B. of the Judicial Code, section 240, 28 U.S.C.A. section 347, relating to the issuance of writs of *certiorari* to bring up for review judgments of the Circuit Courts of Appeals.

POINTS AND AUTHORITIES RELIED ON.

I.

The Circuit Court of Appeals has decided an important question of the local law of Arkansas in a way that is in conflict with the Arkansas decisions.

II.

According to the decisions of the Arkansas courts the intention of the testator if clearly expressed controls over all technical rules of construction.

LeFlore v. *Handlin,* 153 Ark. 421, 240 S.W. 712.

Board of Directors St. Francis Levee District, v. *Brown,* 90 Fed. (2d) 686 (C.C.A. 8).

III.

Under the decisions of the Arkansas courts the will of Tennie Mayo devised a life estate to Lawrence and Kate Mayo, with remainder in fee to the two grandchildren of the testatrix, who were her sole heirs at law.

Bowen v. *Frank,* 179 Ark. 1004, 18 S.W. (2d) 1020.

Gist v. *Pettus,* 115 Ark. 400, 171 S.W. 480.

Driver v. *Driver,* 187 Ark. 875, 63 S.W. (2d) 274.

Hughes v. *Edwards,* 198 Ark. 673, 130 S.W. (2d) 713.

Williams v. *Chambers,* 195 Ark. 654, 113 S.W. (2d) 722.

Hardage v. *Stroop,* 58 Ark. 303, 24 S.W. 490.

Yeates v. *Yeates,* 179 Ark. 543, 16 S.W. (2d) 996.

Wallace v. *Wallace,* 179 Ark. 30, 13 S.W. (2d) 810.

Rolfe v. *Coates,* 282 Fed. 586 (C.C.A. 8)

ARGUMENT.

I.

The Circuit Court of Appeals has decided an important question of the local law of Arkansas in a way that is in conflict with the Arkansas decisions.

This is a suit by Mildred Mayo Deal against Venda C. Abramson to recover an undivided one-half interest in a farm in Arkansas. The farm was owned by Tennie Mayo, who is the common source of title, and both parties claim under her will.

Tennie Mayo had only one child, Lawrence Mayo, whose wife was Kate Mayo. At the time she executed the will, and at the time of her death, Lawrence and Kate had no children.

Tennie Mayo's will was as follows:

> "I give and bequeath all of my real estate of whatever description to my son Lawrence Mayo and his wife Kate Mayo and their heirs during their natural life time, to be used for their support and maintenance only as long as they shall live, with the express understanding that they are not to mortgage or sell the same. After the death of my said son Lawrence and his wife Kate Mayo and their heirs all of my real estate shall revert to my legal heirs." Rec 17

After the death of Tennie Mayo, Lawrence and Kate had one child, Nathan Mayo. Kate died and Lawrence remarried. There was only one child of his second marriage, Mildred Mayo, who is the plaintiff.

Lawrence and Kate conveyed the farm by warranty deed to Rudolph Abramson. Nathan Mayo also executed

a warranty deed to Rudolph Abramson. Rudolph Abramson devised the farm to the defendant, Venda C. Abramson.

Lawrence Mayo died February 16, 1937, leaving two children, Nathan C. Mayo, the child of the first marriage, and Mildred Mayo Deal, the child of the second marriage. The life estate in Lawrence and Kaye Mayo terminated at Lawrence's death. His daughter, Mildred Mayo Deal, then brought this suit to recover an undivided one-half interest in the farm under her grandmother's will No question of the statute of limitations is involved. Rec 17

On the termination of the life estate the will of Tennie Mayo, construed according to the Arkansas decisions, vested an undivided one-half interest in the farm in the testatrix's grandson, Nathan Mayo, which passed by his deed to the defendant, and an undivided one-half interest in her granddaughter, Mildred Mayo. Under the decision of the Circuit Court of Appeals in this case, the grandaughter is disinherited, and takes nothing.

If the decision is allowed to stand, the title to real property in Arkansas under wills similar to Tennie Mayo's will go to one claimant if it is adjudicated in a state court, and will go to an entirely different claimant if it is adjudicated in a federal court.

II.

According to the decisions of the Arkansas courts the intention of a testator, if clearly expressed, controls over all technical rules of construction.

> "Over and over again we have said that the rule in the construction of wills is to give effect to what

appears to be the intention of the testator in view of all the provisions of the will. * * * In the case of *Eagle* v. *Oldham, supra,* we cited and quoted *Smith* v. *Bell,* 31 U. S. 68, where Chief Justice Marshall said: 'The first and great rule in exposition of wills (to which all other rules must bend) is that the intention of the testator expressed in his will shall prevail, provided it be consistent with the rules of law."

LeFlore v. *Handlin,* 153 Ark. 421.

The Circuit Court of Appeals has held that the foregoing is the rule for the construction of wills as established by the Arkansas decisions. The court said:

"As this will in question affects the title to real estate situated in the State of Arkansas, its construction must be under the laws of Arkansas. * * * In construing a will, the testator's intention must be determined from a construction of the instrument as a whole, and technical rules of construction should not be resorted to where the application of such rules defeats the manifest intention of the testator."

Board of Directors St. Francis Levee District v. *Brown,* 90 Fed. (2d) 686 (C.C.A. 8)

III.

Under the decisions of the Arkansas courts the will of Tennie Mayo devised a life estate to Lawrence and Kate Mayo, with remainder in fee to the two grandchildren of the testatrix, who were her sole heirs at law.

The will of Tennie Mayo devises her real estate to Lawrence and Kate Mayo and their heirs. If the will had stopped at this point, it would have vested a fee simple estate in Lawrence and Kate. Under the decisions in Arkansas, however, a devise of a fee simple estate is cut

down to a lesser estate, such as a life estate, if the provisions of the will taken as a whole clearly indicate that such is the intention of the testator.

The case of *Bowen* v. *Frank*, 179 Ark. 1004, is exactly in point. The fourth item of the will involved in that case was as follows:

> "I hereby give, devise and bequeath to my seven children and legal heirs, to-wit, Charles F., Robert B., John L., Walter A., Clara M., Elizabeth G., and Leonora E. Frank, now Mrs. S. A. Bowen, all of my property, real, personal and mixed, wheresoever situated, not already disposed of, which I now own or may hereafter acquire, and of which I may die seized and possessed, absolutely and in fee simple, and in equal shares."

A subsequent provision of the will was as follows:

> "The property of my daughters, however, shall be held and owned by them for their sole and separate use and enjoyment, free from the debts and contracts of any husbands, for and during their natural lives, with remainder in fee to their children, and in default of children surviving either of them, then to my children who shall then be living, their heirs and assigns forever."

In construing this will the Supreme Court of Arkansas said:

> "The first clause of the fourth item provides equally for each of the seven children of the testator, and devises an estate in fee simple to each of them, sons and daughters alike. The last clause of this item, however, announces an unmistakable intention to limit the interest of his daughters to a life estate in their respective shares, as clearly as his intention in the opening clause had by its terms created an own-

ership in fee. There is no ambiguity or obscurity in either of these clauses, and no room for the operation of the rule that a clear grant of the fee by an earlier provision of the will will not be modified or qualified by a later obscure and ambiguous provision, as said by the Tennessee court. Since the last clause in a will governs in its construction in determining the intention of the testator, we are constrained to agree to the holding of the Tennessee court, that it was the intention of the testator to devise to his said three daughters a life estate only, with a remainder in fee to their children, and if no children, then to the children of the testator then living, their heirs and assigns."

Bowen v. *Frank,* 179 Ark. 1004, 18 S.W. (2d) 1037.

To the same effect see:

Gist v. *Pettus,* 115 Ark. 400, 171 S.W. 480.

Driver v. *Driver,* 187 Ark. 875, 63 S.W. (2d) 274.

Hughes v. *Edwards,* 198 Ark. 673, 130 S.W. (2d) 713.

Williams v. *Chambers,* 195 Ark. 654, 113 S.W. (2d) 722.

The decision of the Circuit Court of Appeals is directly in conflict with the decision of the Supreme Court of Arkansas in *Bowen* v. *Frank, supra.* The court found that the intention of the testatrix was to give a life estate only to Lawrence and Kate. "Clearly," the court said, "a life estate was intended so far as Lawrence and Kate Mayo were concerned." Yet the court construed the will as devising a fee simple estate to Lawrence and Kate.

The Arkansas courts would have given effect to what is conceded to be the clear intention of the testatrix. The

Circuit Court of Appeals defeated this clear intention by the application of technical rules of construction.

The Circuit Court of Appeals said:

> "The cardinal rule in the construction of wills is that the intention of the testator must be ascertained if possible and must be given effect, unless in contravention of some established rule of law or public policy. * * * It is well settled, however, that a will cannot be construed so as to effectuate an intention of the testator which is contrary to a rule of law or public policy."

The rule of law which the court mentions was the rule in Shelley's case. The court holds that the intention of the testator cannot be effectuated if it is contrary to this rule.

We have shown that under the Arkansas decisions a devise of a fee simple estate in express terms can be cut down to a life estate by subsequent provisions in the will indicating that such is the intention of the testator. The Circuit Court of Appeals holds, in effect, that if the language of the will creates a fee simple estate, not in express terms, but by the operation of the rule in Shelley's case, the fee simple cannot be cut down to a life estate by subsequent provisions in the will, though "clearly a life estate was intended."

The Circuit Court of Appeals gave effect to the intention of the testatrix by cutting down the fee simple estate devised by the words "to my son Lawrence Mayo and his wife Kate Mayo and their heirs" to a life estate because of the qualifying words "during their natural life time," for, the court said, "clearly a life estate was

intended so far as Lawrence and Kate Mayo were concerned." The devise to them and to their heirs did not give them the fee because it was clearly the intention of the testatrix that they should not take the fee. But the court defeated the intention of the testatrix by first construing the will as a devise to Lawrence and Kate for life with remainder to their heirs, and then applying the rule in Shelley's case. The court thereby used the intention of the testatrix to cut down a fee simple to a life estate and then used the rule in Shelley's case to build a life estate back into a fee simple estate, contrary to the intention of the testatrix.

Tennie Mayo did not devise her propery to Lawrence and Kate for life, with remainder in fee to their heirs. She devised a life estate to them with remainder after their deaths to her own heirs, who turned out to be her two grandchildren.

While Tennie Mayo knew nothing of the technical rules of construction, the will shows that she thoroughly appreciated the difference between a fee simple estate and a life estate. She owned the farm involved in this litigation, and also a house and lots in the town of Holly Grove not far from the farm. She devised both the farm and the house and lots to Lawrence and Kate for their lives, with the remainder to her own legal heirs. After her will to that effect was written and read to her, she changed her mind and likewise changed her will. She decided to give the house and lots to Lawrence and Kate in fee simple. To do this she added the following to her will:

> "After having heard the above will read, I hereby give and bequeath unto my son Lawrence Mayo and his wife Kate Mayo and unto their heirs my house and lots in the town of Holly Grove to dispose

of as they may see fit, but all of my other real estate shall be disposed of as heretofore written or expressed in the other will." Rec 17

The effect of the decision of the Circuit Court of Appeals is to give the farm to Lawrence and Kate in fee simple as well as the house and lots in the town of Holly Grove. This was directly in the face of the declared intention of the testatrix. It was directly in conflict with the established rule of property in the State of Arkansas as evidenced by the decisions of the Supreme Court of that state.

The Circuit Court of Appeals gave effect to the intention of the testatrix for one purpose and refused to give effect to it for another. The devise to Lawrence and Kate "and their heirs," standing alone, would have created a fee simple estate in them. But these words were followed by the qualifying words "during their natural life time." The court therefore said that "clearly a life estate was intended so far as Lawrence and Kate were concerned." They did not take the fee, though the devise to them and their heirs carried the fee, because, according to the court, the subsequent qualifying words showed that it was not the intention of the testatrix to give them the fee.

But the court defeated the intention of the testatrix, which the court used to cut the fee to a life estate, by applying the rule in Shelley's case so as to build the life estate back into a fee, though the testatrix clearly did not intend to give the fee.

The court said:

"The testatrix included the heirs of Lawrence and Kate, and in form this was a devise of a re-

mainder to them. But a devise to one for life remainder to his heirs vests in the first taker a fee simple title."

The court, by construction, made a new will which was very different from Tennie Mayo's will, and thereby defeated the clear intention which she expressed in her will. It resolved her devise to Lawrence and Kate and their heirs, which standing alone would have vested the fee in them, into two separate component parts, namely, to Lawrence and Kate for life, remainder to their heirs. The court then held that the devise to them and their heirs did not vest the fee, because the will showed that she did not intend to give them the fee, but that the same devise, construed as a devise to them for life with remainder to their heirs, did vest the fee in them, though the will equally showed that even in that case she did not intend to give them the fee.

There is no rule of law or of public policy in Arkansas which would prevent a testator from contravening the rule in Shelley's case, or from devising his property contrary to that rule.

Tennie Mayo, of course, never heard of the rule in Shelley's case, but she knew that the laws of Arkansas permitted her to dispose of her property as she saw fit. If, however, she had been familiar with the rule in Shelley's case, and had devised her real property to Lawrence and Kate for their lives with remainder in fee to their heirs, but had added: "I know that the above devise, under the rule in Shelley's case, would vest the fee simple title in Lawrence and Kate, but it is my intention to give them only a life estate with remainder in fee at their death to my legal heirs," the devise would have created only a life

estate in the first takers, under the Arkansas decisions, with remainder to the testatrix's heirs, in spite of the rule in Shelley's case.

Through an involved method of technical construction the Circuit Court of Appeals ran counter to the decisions of the Supreme Court of Arkansas, which give effect to the intention of the testator when it clearly appears, regardless of the rules of construction which the state courts only apply in an effort to arrive at intention, and decided an important question of local law in conflict with the applicable state decisions.

If the decision stands, an owner of real property in Arkansas cannot devise it contrary to the rule in Shelley's case, even though he expressly declares his intention to do so. That is the result which the court reached in the present case. The court held that Lawrence and Kate took the fee under the rule in Shelley's case, notwithstanding the fact that the will construed as a whole clearly showed that the testatrix intended that they should take only a life estate, and the will provided that the fee should go to the testatrix's heirs and not to the heirs of Lawrence and Kate. The Arkansas decisions would have given full effect to the intention of the testatrix even if the will, in express technical terms, had devised the property to Lawrence and Kate and their heirs in fee simple, but had followed the devise of the fee with the limitation cutting it down to a life estate with remainder to the heirs of the testatrix. In this respect the decision of the Circuit Court of Appeals is in irreconcilable conflict with the decisions of the state courts, and will unsettle titles and create great confusion in the law of wills and of real property in Arkansas.

The Circuit Court of Appeals treated the rule in Shelley's case as sacrosanct, and allowed its application to influence it in arriving at the intention of the testatrix. This is contrary to the decisions of the Arkansas courts.

> "The rule in Shelley's case is never a means to discover the intention. It is applicable only if that has been discovered."
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> *Hardage* v. *Stroop,* 58 Ark. 303.

When the intention of the testator is once discovered from the will as a whole, the rule in Shelley's case can be applied in carrying out the intention if it is consistent with the intention. It can never be applied, under the Arkansas decisions, to defeat the intention of the testator.

A husband devised his real property to his wife "and the heirs of her body." Under the rule in Shelley's case, as it existed at the common law, this would have vested a fee simple estate in the wife. Under a statute of Arkansas modifying the rule in Shelley's case, it would have vested a life estate in the widow, with the remainder in fee in the heirs of her body. But the words "to my wife and the heirs of her body," were followed by the words "for their absolute use and benefit for her lifetime." It was contended that the widow took a life estate and her children the remainder in fee. But the court held that the intention of the testator must prevail, and that the language of the will showed that his intention was that the children should share in the life estate, as well as take the remainder.

> *Williams* v. *Chambers,* 196 Ark. 654, 113 S.W. (2d) 722

A devise was to the testator's wife for her life, then two-fifths of the estate to the testator's daughter, Pauline, "to be held by her and her heirs." The next sentence was: "At her death all the same to go to her bodily heirs, should she leave any, but if she should leave none, then to go to her sister Louisa and her bodily heirs." It was contended that the devise to Pauline "and her heirs" vested a fee simple estate in her. The court said:

> "The general rule is that in a devise of lands to one without words of limitation the devisee takes an estate for life only, but the intention of the testator to give a fee or a less estate may be gathered from any part of the will. Thus the language, 'it is my will that my daughter Pauline shall have the other two-fifths of my estate,' if standing alone, would have created, at common law at least, an estate for her life only, and the subsequent words 'to be held by her and her heirs,' if read without reference to what follows, would be sufficient to vest in her a fee simple in remainder after her mother's life estate. But in construing the words of a devise the whole should be taken together. We are not to give an absolute technical meaning to one part of the language and then reject another part as inconsistent with it. As the former may be enlarged, so it may be restrained and qualified by what follows.
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> "Now, after the words last quoted, which if left without qualification would have enlarged the life estate into a fee simple, the testator has added: 'At her death (Pauline's) all the same to go to her bodily heirs, should she leave any, but if she leave none,' then over. This clause in effect defines what is meant by the preceding use of the word 'heirs' and is a restraint upon its general application."

Myar v. *Snow,* 49 Ark. 125, 4 S.W. 381.

The court held that Pauline took a life estate only, and that the fee vested in her bodily heirs.

According to the decision of the Circuit Court of Appeals, Pauline would have taken the fee under the rule in Shelley's case, for a devise to Pauline for life, remainder to the heirs of her body, would have brought the devise within the exact definition of the rule. But the Supreme Court of Arkansas gave full effect to the intention of the testator, and held that Pauline took only a life estate, and the heirs of her body took the fee. The result of the conflict between the decisions of the state and the federal court is that under the former Pauline would take only a life estate whereas under the latter she would take the fee.

The will of Tennie Mayo devises her real property "to my son Lawrence Mayo and his wife Kate Mayo and their heirs during their natural lifetime." It then provides: "After the death of my son Lawrence Mayo and his wife Kate Mayo and their heirs all of my real estate shall revert to my legal heirs." Under the rule in *Myar* v. *Snow, supra,* this vested only a life estate in Lawrence and Kate, with the remainder in fee to the heirs of the testatrix, who were her two grandchildren, instead of vesting the fee in Lawrence and Kate to the exclusion of the grandchildren.

The only difference between the devise in *Myar* v. *Snow* and the devise in the present case is that in the *Myar* case the remainder after the life estate was given to the bodily heirs of the life tenant, and in the present case the remainder after the life estate is given to the legal heirs of the testatrix. We are not concerned, on this petition, with the question whether the legal heirs of Tennie Mayo are to be determined as of the date of her

death or as of the date of the deaths of the life tenants, for that is a question which goes only to the merits of the case. But we are vitally concerned, for the sake of titles to real property in Arkansas, with the conflict between the decision of the Circuit Court of Appeals and the decisions of the Supreme Court of Arkansas on an important rule of law governing the testamentary disposition of real estate.

It may be conceded that if the language of a will clearly shows an intention of the testator to devise real property to a devisee for life with remainder in fee to his heirs, to which the rule in Shelley's case would apply and would vest the fee in the devisee, the testator could not engraft limitations that would be repugnant to the devise of the fee, as contradistinguished from limitations showing a clear intention to cut down the fee. But when the language of the will clearly shows that the testator intended to devise a life estate only, with the remainder, not to the heirs of the life tenant, but to the heirs of the devisor, the rule in Shelley's case should not be applied so as to defeat the clear intention of the testator, and the Arkansas courts would not so apply it.

In an effort to give effect to certain technical words in the will of Tennie Mayo, the Circuit Court of Appeals construed the will to vest a fee simple estate in Lawrence and Kate, though the court said that "clearly a life estate was intended so far as Lawrence and Kate Mayo were concerned."

Under the Arkansas decisions, the unskillful or inappropriate employment of technical terms in a will is never permitted to thwart the clear intention of the testator—and the Circuit Court of Appeals said that the will in this case was "obviously drawn by an unskilled person."

The technical words "and their heirs" are incongruously used both in the devising clause and in the residuary clause, and they are obviously used in the same sense, but without an appreciation of their technical significance, in both clauses.

Notwithstanding the devise was to Lawrence and Kate "and their heirs", the court had no difficulty in determining from the succeeding words "during their natural lifetime" that: "Clearly a life estate was intended so far as Lawrence and Kate Mayo were concerned." This was in exact accord with the Arkansas decisions, for it gave effect to the intention of the testatrix. But the court then put a reverse curve on the technical words "and their heirs" by an application of the rule in Shelley's case, and thereby converted the life estate into a fee simple, contrary to the intention of the testatrix. This was in direct conflict with the Arkansas decisions. Under the state decisions the intention controls, when it clearly appears, regardless of the obscurity which the unskillful use of technical phrases might otherwise create.

In a leading case in Arkansas the will was as follows:

> "I give and bequeath to my beloved daughter, Nancy Johnson, all the rest and residue of my estate, real and personal or mixed * * * during her natural life, and then to be equally divided between the children of the said Nancy Johnson. *To have and to hold the same to her, the said Nancy Johnson, her heirs, executors, administrators and assigns to her and her use and behoof forever.*" (Italics supplied.)

It was contended that under the rule that "where two parts of a will are totally irreconcilable, the latter overrules the former," the daughter took the fee. But the

court held that the clear intention was to give her only a life estate, and that this intention should control. The court said:

> "We think, however, taking the intention of the testatrix as a guide, that there is no real inconsistency. The language employed in the first part of the clause, limiting the remainder to the children, was clear and explicit, was adapted to the commonest understanding, and was doubtless well understood by the testatrix. But that employed in the latter part of the clause, immediately following, was, in substance, such as is used in the *habendum* or formal clause, ordinarily inserted in deeds of conveyance—it was technical language, inappropriately and unskillfully used, the legal meaning of which it may be supposed was unknown both to the testatrix and the draughtsman. Inasmuch as, in common parlance, the word *heirs* is often inaccurately used to designate children, it might be inferred that the language was employed with the view of completing, but not changing, that which was done by the former part of the clause—though, most likely, it was used as mere matter of form, unintelligible to the testatrix, and to which she attached no definite meaning. To suppose that the testatrix, after giving to the children, in language too plain to admit of construction, an interest in the slaves, meant to deprive them of that interest by the use of the technical phraseology—to her a mere form of words—immediately following, without so much as expressly mentioning or referring to the children, would be most unreasonable. We cannot hold that such was her meaning. On the contrary, consistently with what seems to have been the intention of the testatrix, we reject the latter part of the clause in question as incongruous words, serving only to embarrass the plain provision with which they are connected."
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> *Cox* v. *Britt*, 22 Ark. 567.

The case last cited shows the extent to which the Arkansas decisions give effect to the intention of the testator. The Circuit Court of Appeals correctly stated the rule in Arkansas. It said:

> "The cardinal rule in the construction of wills is that the intention of the testator must be ascertained if possible and must be given effect, unless in contravention of some established rule of law or public policy. * * * It is equally well settled, however, that a will cannot be construed so as to effectuate an intention of the testator which is contrary to a rule of law or public policy."

But the court incorrectly interpreted what the Arkansas decisions mean when they say that effect cannot be given to the intention of the testator if it violates some rule of law. By rule of law the Arkansas courts mean some established rule that constitutes a positive legal bar, such as the rule that a testator cannot devise a fee simple estate and make it inalienable, even though he intends to make it inalienable; the rule that a husband cannot devise his real property so as to cut out his widow's dower, though he intends to cut out her dower; the rule that one may not devise an estate which is not to take effect within the period of a life or lives in being, the period of gestation, and twenty-one years, though the testator intends that it shall not spring into being until after that period; and the rule that one cannot make a devise of real property free from the debts of the devisee, except by creating a spendthrift trust, even though such is the testator's intention. The rules of law that constitute positive bars have been established for the benefit and the protection of the public, and the law does not permit them to be violated. But the rules of law which would apply to the testamentary disposition of property in the absence of a

contrary intent may be ignored or contravened by the devisor. It is a rule of law that a devise of real property to a devisee, without more, will vest only a life estate, but this may be increased to a fee simple by subsequent language in the will showing an intention to give the fee. It is a rule of law that a devise to one and his heirs will vest the fee, but this may be cut to a life estate by a clearly expressed intention to give only a life estate (*Bowen* v. *Frank, supra.*) It is a rule of law that a devise to one for life with remainder to his heirs will vest the fee in the first taker under the rule in Shelley's case, but this may be converted into an entirely different estate by language which unmistakably declares an intention not to give the fee, but to give a different or less estate. It is a rule of law that where two clauses in a will conflict with each other the last will control, but this rule may be reversed if the real intention of the testator requires a reversal, as was the case of *Cox* v. *Britt, supra.*

The decision of the Circuit Court of Appeals conflicts with the decisions of the Supreme Court of Arkansas which announce the foregoing principles governing the testamentary disposition of real property in Arkansas. The court found that it was clearly the intention of the testatrix to give only a life estate to Lawrence and Kate, but said that the devise included "their heirs," and that "in form this was a devise of a remainder to them," which under the rule in *Shelley's* case, gave Lawrence and Kate the fee. Under the Arkansas decisions, however, the devise to Lawrence and Kate and their heirs "during their natural lifetime" vested only a life estate in them, notwithstanding the unskillful use of the words "and their heirs," (*Cox* v. *Britt, supra,*) and the residuary clause "after the death of my said son Lawrence and his wife

Kate Mayo and their heirs, all of my real estate shall revert to my legal heirs," vested the remainder, on the termination of the life estate, in the legal heirs of the testatrix, who were her grandchildren, notwithstanding an unskillful repetition of the words "and their heirs."

After construing the words "and their heirs" in the devising clause to be "in form a remainder" to the heirs of Lawrence and Kate, the court held that the will so construed brought the devise within the rule in *Shelley's* case and vested the fee in Lawrence and Kate, contrary to the clear intention of the testatrix to give them a life estate only, and that the express limitations in the will, which showed a positive intention not to give the fee, violated the rule against restricting the alienability of a fee, and the rule against devising a fee after a fee, because the unskillful use of technical words in the will created a fee.

The Arkansas courts, having once found from the language of the whole will that the clear intention was to give a life estate only to Lawrence and Kate, would have disregarded the words "and their heirs" in both the devising and the residuary clauses "as technical language inappropriately and unskillfully used, the legal meaning of which it may be supposed was unknown both to the testatrix and the draughtsman," (*Cox* v. *Britt, supra.*) and would have construed the will as a devise to Lawrence and Kate "during their natural lifetime," with remainder to the heirs of the testatrix.

The Arkansas courts would never have eliminated the words "and their heirs" from the testamentary picture, in order to give effect to the intention of the testatrix, and then have brought them back into the picture, and

given them their technical meaning, when to do so would defeat the intention of the testatrix.

Tennie Mayo made a very natural will in the circumstances. At the time she made the will, and at the time of her death, Lawrence and Kate had no children. She knew that Lawrence might have children either by Kate or by another wife. If so, the testatrix's grandchildren would be the natural objects of her bounty. Under her will, construed according to the Arkansas decisions, Lawrence and Kate would have taken a life estate, and the two grandchildren of the testatrix, Nathan and Mildred, would have been taken the fee. Each would have taken an undivided one-half interest, and Nathan's interest would have inured to the defendant, Venda C. Abramson, under the warranty in his deed to her. The decision of the Circuit Court of Appeals gives the fee simple estate to Lawrence and Kate, and cuts out both of the grandchildren. This is in direct conflict with the decisions of the Arkansas courts.

> "Unless there is a manifest intention to the contrary, the presumption that the testator intended that his propery should go in accordance with the law of descent and distribution will be applied as an aid in construing the will; * * * * the heirs at law will not be disinherited by mere conjecture, but only by express words in the will, or by necessary implication arising from them."
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> *Yeates* v. *Yeates,* 179 Ark. 543, 16 S.W. (2d) 996.

> "Intent to disinherit the heir is essential to raise an estate by implication, the presumption being, in the absence of plain words in the will to the contrary, that the testator intended that his property should go in the legal channel of descent."
>
> *Wallace* v. *Wallace,* 179 Ark. 30, 13 S.W. (2d) 810.

In construing an Arkansas will the Circuit Court of Appeals held that it would not put a construction on a will that would do violence to what the court might conceive to be the natural impulses of a testator unless compelled to do so by the positive language of the will. The court said:

> "The statement of such a proposition reveals its abnormality to be so far unnatural and shocking as to be rejected except in the face of clear proof of such intention. While such an intention is not unlawful, yet it is unnatural and opposed to good conscience. It will, therefore, never be presumed by equity, nor will it be accepted as present, unless clearly proven to be so."
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> *Rolfe* v. *Coates,* 282 Fed. 586 (C.C.A. 8)

By providing that the farm was to be used for the support and maintenance of Lawrence and Kate only as long as they should live, with the express understanding that they were not to mortgage or sell it, Tennie Mayo, who knew their circumstances, needs and dispositions, intended to shield them against their own extravagance and improvidence during their life time. She also intended that at their deaths her property should go to her legal heirs, whoever they might be, and not to the heirs of Lawrence and Kate, unless they turned out to be her heirs also. But her intentions were thwarted, and the disposition of her property changed, because the Circuit Court of Appeals thought that her intentions antagonized the rule in Shelley's case. This could never have happened in an Arkansas court under the Arkansas decisions.

Of course, this court is not concerned with the merits of a case in a petition for a *certiorari.* It is only concerned with the conflict between the decision of the Cir-

cuit Court of Appeals and the decisions of the Supreme Court of Arkansas on an important rule of real property in the State of Arkansas.

There is no question of local law of greater importance than the legal rules governing the testamentary disposition of real property.

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